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NECESSITY AND MURDER

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Abstract: This article argues that there is an alternative and hitherto unarticulated defence of necessity latent in the case law which could be a defence to murder.

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This article argues that there is an alternative and hitherto unarticulated defence of necessity latent in the case law which could be a defence to murder. The defence can be formulated as follows: if a group of two or more people are virtually certain to suffer death imminently and together, from the same cause, but one or more could be saved only by killing a particular person in that group, then such killing would be lawful. (The killer does not have to be one of the group.) Formulating the defence this way also reveals its underlying justification: if all life is otherwise going to be lost anyway, it is better to save at least some of that life.

This article begins by showing how this proposed defence of necessity is consistent with the leading cases and prominent real-life situations. It then differentiates the proposed defence from a defence of lesser evil necessity.

Consistent with *Howe*

Let us begin by considering the defence of duress by threats. An example of duress by threats, in circumstances broadly similar to the proposed defence of necessity, would be

where A threatened to kill B unless B killed C. However, following *R v Howe*,¹ duress by threats is no defence to murder. Nevertheless, the proposed defence of necessity, even available on a charge of murder, is compatible with that state of affairs. We can differentiate the two defences, even in circumstances where both relate to the defendant killing in order to avoid death.

One familiar way of differentiating the defences is to say that, with duress, the defendant's otherwise wrong act is deemed lawful in recognition of the pressure he was under, whereas the essence of a necessity plea is that the defendant did the right thing in all the circumstances. Or to put it another way, duress is an excuse, whereas necessity is a justification. This is not the approach advocated here, for the following reasons.

Some authors question whether a theory which divides criminal defences into justifications and excuses is useful at all,² or deny that it should be rigorously maintained.³ Some authors question whether justification and excuse must be mutually exclusive categories, and which one is morally superior.⁴ Some authors deny that the categorization of a defence as a justification or as an excuse should have any practical consequences.⁵ Further, while duress is usually thought of as an excuse, there are some authors who suggest that

¹*R v Howe* [1987] AC 417 (HL)

² Simester et al, *Criminal Law, Theory and Doctrine*, 5th ed (Oxford: Hart, 2013) 673-677; Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford: Oxford University Press, 2011) 284-286

³ Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Columbia LR* 1897

⁴ Husak, 'On the Supposed Priority of Justification to Excuse' (2005) 24 *Law and Phil* 557; Wells, 'Necessity and the common law' (1985) 5 *OJLS* 471, 475

⁵ Gur-Arye, 'Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' (1986) 102 *LQR* 71; Clarkson, 'Necessary action: a new defence' [2004] *Crim LR* 13, 18-20

duress is a justification,⁶ and others who accept that duress might be a justification on some facts and an excuse on other facts.⁷ Some authors suggest that duress is neither a justification nor an excuse but occupies a third or middle ground.⁸ And while necessity is usually taken as a paradigm justification, still there are some authors who suggest that it might overlap with duress,⁹ or that on certain facts it too might be an excuse.¹⁰

All told, there is too much controversy about theories of justification and excuse, and the place of duress and necessity therein, to make this a reliable basis for distinguishing between duress by threats being no defence to murder, and necessity being a defence to murder.

There is an alternative way of differentiating duress by threats from necessity. With duress by threats, what happens in effect is that B seeks to transfer the risk of death onto C, when it originally applied only to him (at the hands of A). It is that transfer, perhaps, which caused Lord Hailsham to consider the person who kills under duress by threats to be cowardly.¹¹ But with the proposed defence of necessity, the killer does not transfer any risk of death to the victim. Admittedly, he precipitates the victim's death, but the victim was going to die soon anyway and imminently. The precipitation is lawful because it was the only

⁶ Westen and Mangiafico, 'The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters' (2003) 6 Buffalo Crim L Rev 833

⁷ Uniacke, 'Killing under Duress' (1989) 6 J App Phil 53, 59-61; Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004) 60-62; Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) 116-118; Duff, *Answering for Crime* (Oxford: Hart, 2007) 287-828

⁸ Schopp, *Justification Defenses and Just Convictions* (Cambridge: Cambridge University Press, 1998) ch 5

⁹ Horder (above n 7) 60

¹⁰ Ashworth, *Principles of Criminal Law*, 6th ed (Oxford: Oxford University Press, 2009) 205-206

¹¹ [1987] AC 417, 432

way that anyone could be saved. (We shall consider below the point that there must be a uniquely correct victim.)

Thus duress by threats can be unavailable to murder, because it involves wrongfully transferring death from the killer to the victim, whereas necessity can be a defence of murder in circumstances where the victim was already going to die imminently anyway.

Consistent with *Dudley and Stephens*

In *R v Dudley and Stephens*,¹² four sailors were cast adrift without food or water or prospects of a timely rescue. To stay alive, two sailors killed and ate the cabin boy. They survived and were later rescued and convicted of murder.

The case is often taken as supportive of the broad proposition that necessity is no defence to murder. But some authors have sought to confine it to its own facts, suggesting that on other facts a defence of necessity might still be open.¹³ Indeed, the case of *Re A* (discussed below) can be taken as supportive of the proposition that necessity can be a defence to murder after all. So let us put broad proposition to one side, and look at the detail of *Dudley and Stephens*. The proposed defence of necessity is consistent both with the outcome of that case, and with much of its reasoning.

Three themes appear in the judgment of Lord Coleridge CJ. First, he said that the balance of learned opinion was against necessity as a defence to murder. Second, to allow the defence in such a case would mark an absolute divorce of law from morality. Assuming that both of those points were true in 1884 on the facts of that case, which included cannibalism, nevertheless implicit in both points is the possibility that attitudes can change over time and

¹² (1884) 14 QBD 273 (DC)

¹³ Simester et al (above n 2) 803; Ormerod (above n 2) 371, 372

circumstances, and the availability of the defence likewise. Once again, we shall see this proved true when we discuss *Re A* below.

The third theme in his judgment is a more enduring point of principle, and it was the problem of selecting the victim: why kill the cabin boy rather than another sailor, or why not sacrifice oneself?¹⁴ Yet the proposed defence of necessity already addresses this question: it is only lawful to kill the victim if killing none other than the victim was the only way of saving any life among the group threatened with death. And this is also why the outcome of *Dudley and Stephens* is compatible with the proposed defence of necessity. In *Dudley and Stephens*, life could have been saved by killing any of the four sailors. The death of no particular person was the unique solution to saving life. Killing the cabin boy was not the only possible option. Hence the proposed defence would not have been available, and the outcome (conviction for murder) is supported.

This requirement, that there be a uniquely correct victim, can be justified: if any three in the group of four could be saved by killing any one, then the law will not cast its protection over whomever happens to be strongest or sneakiest. The right to life is not so easily overcome. In order to rely on a defence of necessity to something as serious as *killing*, the parties must show that there was simply no other way.

So what should happen if there are alternatives? The court in *Dudley and Stephens* was against the idea of drawing lots, for example.¹⁵ Presumably the trouble with drawing lots is that the loser can still withdraw his consent to being killed – and consent is no defence to murder anyway. But in other situations, consent might preclude the act of murder. For example, if there are four people but only enough food or water or medicine or life jackets or parachutes for three, the allocation of those necessities could potentially be resolved

¹⁴ (1884) 14 QBD 273, 287-288

¹⁵ (1884) 14 QBD 273, 285

consensually, even though it means one person will die. Such situations need not involve murder; it could be that the ‘victim’ simply accepts his death, not at the hands of another person, but through the agency of whatever danger they all faced, while allowing the others to effect their escape.

Having said this, we could make a bolder claim, and set *Dudley and Stephens* aside as wrongly decided. Then the defence might be available even when there are several ways of saving life. The defence might be available only if the defendant chose the alternative which maximized the saving of life. Or perhaps the defence might be available whether or not the defendant made the best possible choice. All this would require a more robust acceptance that in nasty situations unpleasant events can play out along lines which are morally arbitrary (eg according to the luck or strength of those involved). It would ensure that some life is saved when otherwise all life would have been lost. But it would remain a defence of last resort, when there is no other ‘fair’ way of identifying the victim (eg through consent).

But we do not need to go this far. We can take *Dudley and Stephens* as correctly decided, and that is reflected in the proposed defence of necessity by requiring that the killing of the actual victim was the sole way in which any life could have been saved.

Consistent with *Re A*

In *Re A (Children) (Conjoined Twins: Surgical Separation)*,¹⁶ a hospital sought a declaration that it would be lawful to perform an operation to separate conjoined twins too young to consent and contrary to the wishes of the parents. Without the operation both twins would die very young. With the operation, the stronger twin would probably survive, but the weaker twin would certainly die. The Court of Appeal considered whether a doctor performing the

¹⁶ [2001] Fam 147 (CA)

operation would be guilty of murdering the weaker twin. The court declared the operation lawful. (And the stronger twin has survived to this day.¹⁷)

The three judges arrived at the same decision principally through three different routes.

Ward LJ identified the main issues in the appeal as ascertaining what would be in the best interests of each twin and determining how to balance any conflict of interests.¹⁸ He decided that the operation was in the best interests of the stronger twin but not in the best interests of the weaker twin.¹⁹ He said that the court could not simply refuse to resolve that conflict, but must instead choose the course of action which represents the lesser of two evils.²⁰ He concluded that, as a matter of family law, the balance tipped in favour of the stronger twin because the operation gave her the prospect of a greater quality of life (whereas presumably withholding the operation gave both twins only the prospect of a short life of much lesser quality).²¹ As a matter of criminal law, Ward LJ said that the hospital and the doctors also faced a conflict of duty, to operate for the benefit of the stronger twin and not to operate for the sake of the weaker twin.²² Faced with such an irreconcilable conflict, Ward LJ said that the law must also allow them a way out of the conflict, again by choosing the course

¹⁷ <http://www.dailymail.co.uk/news/article-2780371/Separated-twin-living-life-says-judge-ordered-operation-killed-conjoined-sister.html> (accessed 13 October 2014)

¹⁸ [2001] Fam 147, 181

¹⁹ [2001] Fam 147, 190

²⁰ [2001] Fam 147, 190-2

²¹ [2001] Fam 147, 196-7

²² [2001] Fam 147, 201. Some authors doubt there was any conflict of duties on the facts of *Re A*: Harris, 'Human Beings, Persons and Conjoined Twins' (2001) 9 Med L Rev 221, 227-228; Michalowski, 'Sanctity of life – are some lives more sacred than others?' (2002) 22 LS 377, 392-394

of action which represents the lesser evil.²³ Note that this was not a defence of lesser evil necessity. Ward LJ said that choosing the lesser evil was the way of extricating oneself from a conflict of legal duties. He said nothing about choosing the lesser evil in circumstances of necessity more generally.

A subsidiary ground for Ward LJ's decision was that the doctors would be acting in defence of the stronger twin.²⁴ He said that the weaker twin was killing the stronger twin by the demands of being conjoined so that the doctors could come to the defence of the stronger twin and perform the operation to save her life, even at the cost of the life of the weaker twin.²⁵ Robert Walker LJ also referred to the possibility that the defence of the stronger twin might legitimize the operation, but his reference was brief and hesitant.²⁶

In his judgment, Robert Walker LJ said that the operation would be in the best interests of the weaker twin as well as the stronger twin because the operation would give the weaker twin bodily integrity and human dignity, and because, without the operation, the weaker twin's short life would hold nothing for her except possible pain.²⁷ (Brooke LJ also thought that the operation would benefit the weaker twin in as much as it would give her bodily integrity.²⁸) Robert Walker LJ said that the death of the weaker twin would not amount

²³ [2001] Fam 147, 203

²⁴ [2001] Fam 147, 203-204

²⁵ Some authors doubt whether on the facts of *Re A* the doctors were acting in defence of the stronger twin: Uniacke, 'Was Mary's Death Murder?' (2001) 9 Med L Rev 208, 210-215; Watt, 'Conjoined Twins: Separation as Mutilation' (2001) 9 Med L Rev 237, 241-242; Michalowski (above n 22) 395-396

²⁶ [2001] Fam 147, 255

²⁷ [2001] Fam 147, 258-259

²⁸ [2001] Fam 147, 240. Ward LJ described this as a 'wholly illusory goal' since the weaker twin would be dead before she could enjoy her independence: [2001] Fam 147, 184. And as Watt says, the suggestion that a conjoined twin should be given a more normal-looking body at the cost of her life represents a new low point in the way we see the disabled: (above n 25) 239. Also, the principle of bodily integrity should be about respecting

to murder because the death would result from the weaker twin's own inability to sustain her life, and was not the purpose or intention of the surgery, which was to save the life of the stronger twin, and which was anyway in the best interests of both twins.²⁹ He also said that he would be prepared to extend 'necessity' to cover the situation of choosing between conflicting legal duties.³⁰ But the label of necessity is not really apposite, and was not used by Ward LJ; a better word would be 'dilemma'. At any rate, because Robert Walker LJ thought the operation in the best interests of both twins, he thus had no need for any approach which sought to resolve conflicting legal duties.

Brooke LJ's principal conclusion that the operation was lawful was founded primarily upon the fact that the situation satisfied the test of necessity set out by Stephen in his book *A Digest of the Criminal Law*.³¹ Brooke LJ said that a defence is available for any act needed to avoid inevitable and irreparable evil, when no more is done than reasonably necessary for the purpose to be achieved, and the evil inflicted is not disproportionate to the evil avoided.³² This is a defence of lesser evil necessity.

There was thus no single *ratio* in *Re A*, and none of the approaches lends much support to the defence of necessity proposed in this article. The only real defence of necessity properly so called to be found in *Re A* was the defence of lesser evil necessity in the judgment of Brooke LJ, and we shall criticize that type of defence later in this article. But if all this

the integrity of the body which one has, which in *Re A* was conjoined; it is not a licence to engineer a different body.

²⁹ [2001] Fam 147, 258-259

³⁰ [2001] Fam 147, 254-255

³¹ A comparison of Brooke LJ and Stephen shows that Brooke LJ did not accurately restate Stephen's test of necessity – a test whose foundations anyway came under attack in both *Dudley and Stephens* and *Howe*.

³² [2001] Fam 147, 240

seems unpromising, nevertheless *Re A* turns out to be a significant source of support for the defence of necessity proposed here.

First, the outcome of the case is perfectly consistent with the proposed defence of necessity. Both twins faced death together from the same danger of having been born conjoined. The only way to save either of their lives was by separating them, and that meant killing the weaker twin. Put another way, the weaker twin was the uniquely correct victim.

This straightforward analysis should not be confused with other more misguided language to be found in *Re A*. Brooke LJ said that the weaker twin was ‘self-designated’ for an early death because she was unable to support herself independently of her twin sister.³³ In similar vein, Ward LJ described the weaker twin as ‘doomed’ and ‘designated’ for death.³⁴ But the language of *self*-designation is suggestive of consent, and consent is no defence to murder. It is also an unacceptable euphemism when used in the absence of consent, as on the facts of *Re A*. Even without the language of *self*-designation, simply saying that the weaker twin was (somehow objectively) designated for death or doomed or bound to die takes matters no further forward. *Both* twins were designated for death by the fact of being born conjoined. The fact that the weaker twin in *Re A* had insufficient organs to support herself is irrelevant in this context. This is because she had not been born a singleton but a conjoined twin supported by her sister. It is aberrant to argue that if the weaker twin had been born a singleton she would have died, thus it is acceptable to kill her by making her into a singleton.

The correct analysis is more honest and simple. To repeat, both twins faced death from the same cause of having been born conjoined, and the only way to save either of them was to separate them and thus kill the weaker twin, who for that reason was the uniquely correct victim.

³³ [2001] Fam 147, 239

³⁴ [2001] Fam 147, 197

Second, not only was the outcome in *Re A* itself supportive of the proposed defence of necessity, there were two other real-life situations discussed in *Re A* which similarly support the proposed defence. One concerned the Zeebrugge ferry disaster.³⁵ Dozens of people were on board a sinking ferry with the only escape route being a ladder whose use was blocked by another passenger frozen with fear. Eventually that passenger was thrown off, presumably to his death, and the others escaped. No prosecution followed – and that is consistent with a defence of necessity. All passengers faced the same threat of death from the rising waters and sinking ferry. The only way to save any life was by killing the person blocking the only means of escape. That victim would have been killed anyway and imminently by the rising waters too.³⁶

The other real-life situation was where two mountaineers were roped together, and one had fallen over the precipice, threatening to drag the other to his death.³⁷ The higher mountaineer cut the rope and saved himself, while his companion fell.³⁸ Again, both climbers faced the same danger, of falling to their deaths as a result of being roped together. The only plausible way of saving any life was by cutting the rope, which meant killing the lower mountaineer. Again, he was the uniquely correct victim.

³⁵ Mentioned in *Re A* [2001] Fam 147, 229 (Brooke LJ)

³⁶ Some commentators see the Zeebrugge ferry disaster as an example of acting in self-defence: eg Leverick, *Killing in Self-Defence*, (Oxford: Oxford University Press, 2006) 7-8. Others see it as an example of necessity: eg Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 Can J Law & Juris 143, 151-155. In my view, the escapees were not defending themselves against the person on the ladder, who was no threat. They were imperilled by the rising waters, and acted upon an innocent impediment, not in self-defence against him, but merely out of necessity to effect their escape.

³⁷ Also mentioned in *Re A* [2001] Fam 147, 252 (Robert Walker LJ)

³⁸ And miraculously survived: Simpson, *Touching the Void* (Jonathan Cape, 1988)

We can add to these examples. One year after *Re A* was decided, terrorists flew planes into the World Trade Centre. In a similar attack, the defence of necessity would surely make it lawful to shoot down the plane.³⁹ When the plane crashes into the building, all the passengers will die, and so too the people in the building, all in the same event. The only way to save any life is to shoot down the plane, killing the passengers who would have died anyway, but thereby safeguarding those people in the building.

Thus the outcome in *Re A*, and the real-life examples it discusses, all support the formulation of a defence of necessity to murder as proposed in this article.

One final point to discuss here is the further requirement in the proposed defence that the parties involved must face virtually certain death imminently. This makes it clear that the defence is only available as a last resort, and not when there is time and the possibility of taking alternative action which does not involve killing. Again, this keeps the defence of necessity in line with the courts' current thinking about the defence of duress by threats, which equally must involve a threat due to be carried out immediately or almost immediately.⁴⁰ This requirement seems easily satisfied in the case of the Zeebrugge passengers and the mountain climbers. There was a question in *Dudley and Stephens* whether it was necessary to kill the cabin boy at that point, rather than wait longer for rescue,⁴¹ which might further support the outcome of that case. As for *Re A*, death was certain to come as a result of the twins being conjoined, but it still might have been months, perhaps years, away.⁴² Nevertheless, if it can be said with certainty that the only way to save life is by acting now, though death is not otherwise an immediate threat, the defence should still be available.

³⁹ Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes – Taking Human Life and the Defence of Necessity' (2006) 70 J Crim L 147, 158

⁴⁰ *R v Hasan* [2005] UKHL 22, [28]

⁴¹ (1884) 14 QBD 273, 279

⁴² [2001] Fam 147, 162-163

The defence would miss its purpose if it made the actors forego the one chance to save life in favour of waiting too late until death was upon them.

Not a defence of lesser evil necessity

The defence of necessity proposed here is not a defence of lesser evil necessity of the type envisaged by Brooke LJ in *Re A*. Yes, at a higher level of generality we might say that it is a lesser evil that someone is killed prematurely to ensure that some life at least is saved; but the lesser evil defence is problematic precisely because of its generality, whereas the detailed requirements of the defence of necessity proposed here avoid such problems.

For a start, lesser evil necessity, as formulated by Brooke LJ, would support a different outcome in *Dudley and Stephens*, and it could also render duress by threats a defence to killing (eg where the lives of two people are threatened unless they kill one person). Yet that is incompatible with the law as it currently stands.

Lesser evil necessity would also allow a defendant to transfer the risk of death onto an innocent victim. This is a consequence of the defence of lesser evil necessity being framed in utilitarian terms: it purports to accept the possibility that all interests are commensurable, and that anything goes so long as the end result is somehow in credit. Thus it rides roughshod over individual people and legal rights. To borrow examples from Simester *et al*, a defence of lesser evil necessity could justify stealing from the victim to give the money to a third party for a life-saving operation, or forcing a person with a rare blood group to make a donation to save another's life.⁴³

In contrast, the proposed defence of necessity would not avail in these latter circumstances. The proposed defence does not allow one person to transfer the risk of death

⁴³ Simester et al (above n 2) 801-802

onto an innocent third party. First, the victim must be virtually certain of dying imminently anyway. Second, the death of the victim must save the lives of others imperilled *by the same cause*. It requires the victim and those who benefit from the killing to be ‘in the same boat’. The proposed defence of necessity only applies within one disaster; it does not allow one situation to be traded off against another. It is not simply about maximizing life, broadly stated, but about maximizing survival in one crisis.

A related issue with a defence of lesser evil necessity is what Gardner called ‘the democracy problem’.⁴⁴ It involves a balancing between competing interests which the courts are not well suited to undertake, as the following examples show.

In *R v Jones* the defendants committed criminal damage at a military base in an attempt to hinder the war in Iraq. They sought to rely upon a defence of necessity (among others). On a preliminary issue, the Court of Appeal accepted that the defence might be available in principle.⁴⁵ But if necessity were to mean lesser evil necessity, how could such a defence ever be administered in such a case? Was the war in Iraq a good thing or a bad thing, and for whom, and over what time period? How could a court determine such questions, given the limited time and resources available to it, and especially while the war is on-going?⁴⁶

In *Monsanto v Tilly*,⁴⁷ the defendants pulled up the claimant’s genetically modified crops grown under licence from the Department of the Environment. The defendants said they were acting to protect the public interest against the dangers of genetically modified

⁴⁴ ‘Necessity’s Newest Inventions’ (1991) 11 OJLS 125, 132

⁴⁵ [2004] EWCA Crim 1981

⁴⁶ In the House of Lords, the appeal was on a different point, but Lord Bingham indicated that it would be an extremely rare case in which the courts would be prepared to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed forces: [2006] UKHL 16, [27]-[31]

⁴⁷ [1999] All ER (D) 1321 (CA)

crops, including potential harm to people generally. The defendants relied upon a defence of necessity. Again, if that were to mean lesser evil necessity, how could it ever be administered in such a case? Is genetically modified food a good thing or a bad thing, and for whom, and over what period, and according to what reckoning? The Court of Appeal made it clear that it was structurally incapable of resolving such issues itself, in the limited context of adversarial proceedings between private parties. It also said that such questions concerning the possible risks and rewards of genetically modified crops involved matters of state policy and political judgment which went beyond the constitutional limits of the court. All this called for the sort of wide-ranging inquiry and policy debate best suited structurally and constitutionally to the democratically elected legislature.

One response to the ‘democracy problem’ is to propose a rights-based theory of necessity, which would allow a defendant to act in order to vindicate a legal right by violating only a lesser right.⁴⁸ Gardner gives the example of taking another person’s coat (thereby violating a property right) in order to save a child from drowning (so furthering that child’s right to life).⁴⁹ He says that a rights-based approach avoids the democracy problem of the courts weighing up the balance of utility or welfare, which he says is what the legislature should be doing. Instead, he says that the courts would concern themselves only with rights already legally recognized.

If Gardner’s example seems compelling, it is because it is already covered by a defence of duress of circumstances. That aside, how are rights to be ranked? Could someone be killed or harmed in order to protect important property? Could someone be harmed in order to further another’s right to life? Could lesser evil necessity justify forced blood

⁴⁸ Brudner, ‘A Theory of Necessity’ (1987) 7 OJLS 339; Gardner, ‘Necessity’s Newest Inventions’ (1991) 11 OJLS 125; Gardner, ‘Direct action and the defence of necessity’ [2005] Crim LR 371

⁴⁹ Gardner 2005 (above n 48) 377-378

transfusions or forced kidney transplants from unwilling donors to save a patient's life?⁵⁰ And what about rights which rank equally? One life could not be sacrificed to save more lives because the interest advanced (the *right* to life, rather than the lives themselves) is no greater than the interest sacrificed.⁵¹ Yet then it would follow that lesser property could not be sacrificed to preserve more important property, or minor personal injury could not be inflicted to prevent major personal injury, both of which seem counter-intuitive. Also, as Wilson has pointed out, all this ignores the fact that sometimes less harm is done by sacrificing the superior interest.⁵² And where do other rights fit in, like the right to liberty, or the right to privacy, or the right to freedom of conscience? Are all rights commensurable and capable of assuming a unique slot in a hierarchy of rights? Who is to undertake this ranking? If it is democratically unaccountable judges, the same constitutional objections arise.

None of this is a problem for the defence of necessity proposed here. There are no rights to be ranked; it is only about saving some life when otherwise all life will be lost. There is no question of weighing up one person's interests against another; the victim would have died imminently anyway, and although their death was precipitated, it was their death alone, and no-one else's, which could have produced any net saving of life. Again, there is no question of transferring the risk of death from one person to another, because the soon-to-die victim and those who benefit from the killing all face the same danger together. Beyond the simple but powerful proposition that it is better to save some life rather than lose all life, there is no further room for discretion or value-judgments.

⁵⁰ Yes: Brudner (above n 48) 365

⁵¹ Brudner (above n 48) 365; Wilson, *Criminal Law: Doctrine and Theory*, 3rd ed (Harlow: Pearson, 2008) 194

⁵² Wilson (above n 51) 194 n 40

Conclusion

If a group of two or more people are virtually certain to suffer death imminently and together, from the same cause, but one or more could be saved only by killing a particular person in that group, then such killing would be lawful. (The killer does not have to be one of the group.) This defence of necessity is supported by the outcomes of the leading cases, and it is consistent with the real-life situations discussed in the cases and literature. Its underlying justification is simple but powerful: if all life is otherwise going to be lost anyway, it is better to save at least some of that life. It does not involve transferring the risk of death onto another person, unlike with duress by threats, because the victim must be virtually certain of dying imminently anyway. It does not involve the perilous weighing up of competing interests, unlike with lesser evil necessity, because both the victim and the people who benefit from the killing must be 'in the same boat', facing death together from the same cause, and with the victim being the only person whose death can result in any net saving of life. It is not a broad brush defence of uncertain scope, but a narrow and focused defence which yet provides the best rationale for viewing the case law coherently.